

DEPARTMENT OF STATE REVENUE

04920604.LOF

LETTER OF FINDINGS NUMBER: 92-0604 S/U SALES AND USE TAX

FOR THE YEARS 1989 THROUGH 1991

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Sales and Use Tax: Application of sales tax to morticians

Authority: Sales Tax Information Bulletin #49

IC 6-2.5-5-8

Taxpayer protests a revised assessment of sales tax on items it claims are not additionally taxable.

II. Sales and Use Tax: Calculation of sales tax and the relevance of previous audit.

Authority: Walgreen Co. V. Gross Income Tax Division, 255 Ind. 418 (1947)

The taxpayer claims the Department should be estopped from assessing additional sales tax because the Department did not tell the taxpayer to adjust its calculation of sales tax in the prior audit.

FACTS

The taxpayer is an Indiana corporation operating as a funeral home and offering funeral and mortuary services. The taxpayer also acts as a retail merchant selling tangible personal property such as caskets, vaults, urns, and clothing. The original assessment was protested by the taxpayer on the grounds that additional taxable sales were incorrectly calculated. Adjustments were made to the assessment after a re-examination of the taxpayer's sales invoices. It was determined that the taxpayer furnished tangible personal property as part of its charges for standard funeral services. Furthermore, the taxpayer charged sales tax on fifty percent of those charges.

The auditor contends that the taxpayer incorrectly calculated sales tax on fifty percent of casket sales, even though the caskets were an extra, separately-stated charge. The taxpayer argues that the casket charges are part of the standard service charge and are separately stated primarily for the convenience of customers.

The Department also contends that the taxpayer failed to pay sales tax on the purchase of a hearse and a Buick wagon. The taxpayer maintains that these vehicles are rented to customers and, therefore, sales tax is not due.

I. Sales and Use Tax: Application of sales tax to morticians

DISCUSSION

Sales Tax Information Bulletin #49 states that there are two ways for morticians to calculate sales tax on the merchandise they sell.

The first way is for the mortician to segregate personal property charges from service charges. In this scenario, tax is due on all tangible personal property furnished. In the second way, items are furnished as part of a "standard service" and charges for the property are not separately stated in the billing. Sales tax is computed on fifty percent (50%) of the total price. Any charges over and above the unit price are 100% taxable. The information bulletin also states that providing a breakdown for a unit sale for the customer's information will not alone change this method of figuring tax.

A review of the taxpayer's invoices shows that the taxpayer furnished tangible personal property as part of its separately stated charges for funeral services. The taxpayer charged sales tax on fifty percent of these services. However, the taxpayer also only charged fifty percent tax on the casket sales as well. The caskets are clearly differentiated from the lump sum charge titled "services of funeral director and staff," as are vaults, flowers, and other items for which there can be no standard charge. It is also important to note that Federal Trade Commission has promulgated rules for the funeral industry requiring morticians to breakdown casket charges because they are tangible pieces of personal property. The Department argues that the taxpayer is segregating the cost of the casket, which falls under the first taxing scenario as outlined above.

With regard to the hearse and Buick wagon, the Department notes that they were not purchased for "resale" (here, rental) within the holding of *Miles, Inc. v. Indiana Department of State Revenue*, 659 N.E.2d 1158, 1165. The taxpayer argues that the vehicles are within the scope of Indiana Code 6-2.5-5-8 ("resale exemptions"), which states that transactions involving tangible personal property are exempt from state gross retail tax if the person acquires the property for resale. The taxpayer also relies upon Information Bulletin #49, which states in part that, "Purchases of... tangible personal property by a mortician is subject to sales tax unless such merchandise is purchased for resale."

However, the court in *Miles* held that under IC 6-2.5-5-8 "resale" means that the customer must pay the taxpayer an

itemized amount for that item. The Department points to the fact that the taxpayer does not provide an itemized amount for the leasing of vehicles, and therefore the resale exemption is not available.

FINDING

With regard to the imposition of sales tax on the casket sales, the Department finds the following: the taxpayer should have imposed 100% tax on the caskets, but since sales tax was collected on the caskets via the taxpayer's method, the Department agrees to allow credit for sales tax collected on 50% of the taxpayer's unit price towards the 100% tax due. The taxpayer's protest with regard to the hearse and Buick wagon is denied.

II. Sales and Use Tax: Calculation of sales tax and relevance of previous audit

DISCUSSION

The taxpayer claims that the Department should be estopped from assessing sales tax because "the taxpayer has used the same method of computing taxable sales on a consistent basis for a number of years." Furthermore, the taxpayer argues that there were no adjustments made in previous audits and a previous auditor never disclosed to the taxpayer that it was not calculating the proper amount of taxable sales.

In *Walgreen v. Gross Income Tax Division*, 225 Ind. 418, the Indiana Supreme Court held that, "The taxing authorities of the state during the period mentioned, could not by failing to do their duty, or by any act or failure to act, waive the right and the duty of the state to assess and collect the taxes for the years following." Therefore, in the present case, it is irrelevant that prior audits failed to uncover sales tax deficiencies.

FINDING

The taxpayer's protest is respectfully denied.